A

Yew Hong Teng & Anor v TTDI Jaya Sdn Bhd

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–2070 OF 2009
SEE MEE CHUN J
16 OCTOBER 2015

C *Contract — Breach — Agreement — Sale and purchase agreement for purchase of property — Rescind — Refund of purchase price — Allegation that defendant failed to comply law, by laws and regulations — Allegation of defects, cracks, electrical problems and encroachment — Whether agreement breached — Whether plaintiff entitled to relief claimed*

D

The plaintiffs sought for the sale and purchase agreement ('S&P') entered into between them and defendant be rescinded; refund of purchase price and claimed for damages for breach of contract and exemplary damages. The S&P was in respect of the purchase of a property. The plaintiff submitted that the E failed to comply the law, by laws and regulations in relation to the construction. The breaches complained of were defects, cracks, ground settlement, electrical problems, encroachment, breach of S&P in constructing property different from the building plans. As per the S&P, the defendant had to deliver vacant F possession of the property within 24 months from the date of S&P. The purchase price had been fully paid and the property was sold on the basis of a building plan approved. The primary issue that arose was whether the defendant had been in fundamental breach of S&P such that the plaintiff could seek the relief claimed.

G

Held, allowing the application:

(1) Given the defects, cracks and settlement and electrical problems and that there was encroachment, the plaintiff was in no position to accept the property thereby leading to a total failure of consideration. The H application was allowed. The plaintiff shall execute the transfer of the property to the defendant and the defendant to bear costs of transfer (see paras 31–32).

[Bahasa Malaysia summary

I Plaintif-plaintif memohon bagi perjanjian jual beli ('PJB') yang dimasuki di antara mereka dan defendan dibatalkan; bayaran balik harga belian dan menuntut untuk ganti rugi bagi kemungkiran kontrak dan ganti rugi teladan. PJB adalah berkaitan pembelian hartanah. Plaintif berhujah bahawa dia gagal untuk mematuhi undang-undang, undang-undang kecil dan

peraturan-peraturan berkaitan kepada pembinaan. Kemungkiran-kemungkiran yang diadukan adalah kecacatan, rekahan, pembersihan tanah, masalah elektrik, pencerobohan, kemungkiran PJB dalam pembinaan hartanah berbeza daripada pelan bangunan. Berkaitan PJB, defendan terpaksa memberikan milikan kosong hartanah dalam masa 24 bulan dari tarikh PJB. Harga belian telah dibayar penuh dan hartanah dijual atas asas pelan bangunan yang diluluskan. Isu utama yang berbangkit adalah sama ada defendan telah melanggar asas PJB dengan itu plaintif boleh memohon relif yang dituntut.

Diputuskan, membenarkan permohonan:

(1) Mengambil kira kecacatan, rekahan dan masalah pembersihan dan elektrik dan bahawa terdapat pencerobohan, plaintif bukan berada dalam keadaan untuk menerima hartanah dengan itu membawa kepada kegagalan keseluruhan balasan. Permohonan dibenarkan. Plaintif akan melaksanakan pemindahan hartanah kepada defendan dan defendan menanggung kos pemindahan (lihat perenggan 31–32).]

Notes

For cases on agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3452–3490.

Cases referred to

Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd [2010] MLJU 576; [2010] 7 CLJ 152, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Chase Perdana Bhd Sdn Bhd v Md Afendi Hamdan [2009] 6 MLJ 783, FC (refd)

Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd [2011] 5 MLJ 239, HC (refd)

Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87, CA (refd)

Legislation referred to

Electricity Supply Act 1990

Housing Development (Control and Licensing) Regulations 1989 reg 5(6), Schedule G, Schedule E

Uniform Building By-laws 1984

Ravin Woodhull (KT Tan and Muhd Hazwan with him) (Tan Kim Soon & Co) for the plaintiffs.

Ashmadi bin Othman (Tan Ru En with him) (Che Mokhtar & Ling) for the defendant.

See Mee Chun J:

INTRODUCTION

[1] The plaintiffs had filed an originating summons ('OS') that sale and purchase agreement ('S&P') dated 23 December 2002 entered into between them and the defendant be rescinded; refund of purchase price of RM476,024 ('the purchase price') with 8% interest from 24 December 2004, 10% of purchase price from 24 December 2004 to date of rescission, damages for breach of contract and exemplary damages. The S&P was in respect of the purchase of a property HS(D) 159114 PT No 26529 Mukim Damansara Daerah Petaling measuring 4,735 sqft for a double storey terrace house end lot ('the property'). On 15 August 2013 the Court of Appeal set aside the High Court order dated 28 June 2012 and ordered the matter to proceed as a writ action.

AGREED FACTS

[2] It is an agreed fact in Bundle C that as per S&P the defendant had to deliver vacant possession of the property within 24 months from date of S&P; the purchase price had been fully paid and the property was sold on the basis of a building plan approved bearing reference MBSA/B/PC/SEK: U2/119–2001 as shown in advertisement and sale permit No 5155–2/1575/2003 (7).

PRIMARY ISSUE

[3] Although there were many issues to be tried as set out in Bundle D the primary issue is whether the defendant had been in fundamental breach of S&P such that the plaintiff can seek the relief claimed in the OS.

WITNESSES

[4] The plaintiff had 12 witnesses — Chiong Chee Kin ('PW1') and witness statement marked as WSP1, Azli Moktar ('PW2'), Khoo Leong Hok ('PW3'), Aziz Abdullah ('PW4'), Tan Kuok Wei (('PW5') and witness statement marked as WSP5), Ngo Hea Bing (('PW6') and witness statement marked as WSP6), Hafiz Luden Abd Hamid ('PW7'), Lim Kean Soon ('PW8'), Moo Wee Siong ('PW9'), Hajah Rose Zairani Hj Marmuji ('PW10'), Hajah Fauziah Dato Sanad (('PW11') and witness statement marked as WSP11) and P1 himself (('PW12') and witness statements marked as WSP12 and 12A). The defendant had four witnesses — Adam Ishak (('DW1') and witness statement marked as WSD1)), Khalil Mansor (('DW2') and witness statement marked as WSD2), Abdul Rashid Oyop (('DW3') and witness statement marked as WSD3) and Mohd Zamani Razali ('DW4').

BREACHES AS ALLEGED BY THE PLAINTIFF

[5] P1 had given evidence as PW12. In Q&A 35 (pp 12–28 of WSP12) he narrated the defendant's non-compliance of the law, by laws and regulations. These are in relation to construction based on a set of building plans different from that of S&P, metal gate not opening inwards, width of bathroom doors narrowed down, soil erosion to house compound, no floor trap and small piping works in the kitchen, difference in height between house terrace level and house compound area, ground sinking, house cracking and drainage not flowing, staircase width not consistent and in one instance higher than that allowed by Uniform Building By-laws 1984 ('UBBL'), omission of property compound drainage and use of non registered electrical contractor to install electrical work and non-competent personnel to supervise the electrical work.

[6] In Q&A 36 (pp 28–40 of WSP12) P1 sets out the breach of the terms of S&P. These relate to property not being developed in accordance with building plans as set out in S&P, construction was not even in accordance with the 'new' building plans, omission of works, encroachment and manner of delivery of vacant possession. Refer in particular to Q&A 36(4) on omission as follows:

(a) Reduction of the lot size from 439.92m2 to 327.99m2 (ie 111.93m2 or 1204 square feet).

(b) Property compound turfing amounting to 3,335 ft2 omitted.

(c) Compound concrete drainage and car-poach drainage omitted.

(d) Reduction in the house platform level by as much as 440mm. (Omitting 6,835 cubic feet of earth material to the compound).

(e) Removing the decorative building façade element & features to both of the approved plan. (ie Not following the 1 set or the 2nd set of building plans).

(f) Simplification of the car-porch fontal façade wood paneling.

(g) Sunscreen to the front and side of the house terrace omitted.

(h) Interlocking pavers at the house entrance area omitted.

(i) Side balcony faced outlook and lowering its roof profile.

(j) Family area staircase parapet wall omitted.

(k) Omitting the house common boundary Brickwall/Mild Steel grille fencing at the back of the house.

B2 63–67 shows the omission.

[7] The breaches complained of are thus defects, cracks, ground settlement,

electrical problems, encroachment, breach of S&P in constructing property different from the building plans.

GROUND SETTLEMENT, CRACKS AND DEFECTS

[8] The plaintiff's evidence on ground settlement, cracks and defects was supported by PW1, PW2, PW7, PW8, PW9 and PW11.

[9] PW1 is a civil and structural engineer with 35 years experience and is the managing director of Perunding JPC S/B which provides civil and structural consultancy services for projects such as housing schemes, bungalows etc. He prepared the engineering report dated 15 June 2009 in C 39–46 on the property whereby he conducted a site inspection and compared the photographs with his physical inspection. He found large visible crack lines on the house and the ground had sunk. It was his finding the work was not carried out with good engineering practice and the fill ground had sunk. In cross-examination the photographs he referred to are as in C 39–46 and were shown to him by the plaintiff. He is not aware if it was the plaintiff or someone else who took the photographs. Some photographs had the year 2004 and 2005. When put that the photographs were taken in 2009 he said he wouldn't know. He went to the house once for physical inspection in 2009. The finding of visible cracks was in 2009 and he is not aware of the current situation. The crux of his evidence thus pertains to the situation in 2009 of the cracks and settlement.

[10] PW2 is a civil and structural engineer with 25 years experience and executive director in Ghazali & Assoc S/B which provide services for consulting engineering for civil and structural works for housing development and other types of development. PW2 inspected the property on 31 January 2015 and discovered from the gate there's settlement and cracks surrounding the building, settlement and cracks on the drains, water not being able to flow from catchment area into drain and cracks at side of rubber wall. Based on his physical inspection he is able to verify PW1's report in C 37–46 as true and correct. He was referred to photographs in B2 and asked whether he recognised them as to what he had inspected he stated there are cracks (pp 74–75), cracked internal drain (p 85), staircase finishes worn out (p 92), cracked wall tiles (p 95), cracks at the joint of door opening (p 92), water heater switch inside toilet (p 105) and this may cause short circuit. If rainwater were to seep through the cracks he said as there is already a leakage on the roof due to the water heater switch in the toilet and wet conditions in the toilet there could be a short circuit. The safety problems are serious as the cracked marble means there is settlement. The reasons for the sinking could be due to poor supervision, poor compaction, materials not proper as per drawing and bad workmanship. From his professional experience the property is dangerous to live in as there is a crack

line on the wall which may lead to the wall collapsing. As to whether it can be rectified he answered underpinning has to be done to strengthen the foundation and what has been rectified has occurred again. In cross-examination he has not seen the property in 2009 and is not aware if the plaintiff is not staying there. As to whether the settlement is due to no one staying there he said it is due to the soft ground and water seeping through. It was put to him if there were people staying there the problem could be rectified earlier he replied yes. On the report in C 37–46 and the photographs in B2 he was asked how he could verify what was taken in 2005 and 2015 he said the cracks showed settlement. He has no current photographs. The water heater switch in the toilet can be removed. In re-examination on his answer that if there can people staying in the property the problem could be rectified earlier, he stated the unsuitable material would have to be removed and proper compaction done to achieve the required settlement. PW2's evidence was current and pertained to his inspection in 2015 where there was still settlement and cracks.

[11] Both PW8 and PW9 had visited the property on 29 January 2015 and their evidence was of cracks and settlement with PW9 stating there was water leaking. PW8 had no records or photographs to confirm his evidence. The evidence of PW8 and PW9 when viewed together with PW2 shows the current condition of the property in January 2015.

[12] There was also the evidence of PW7 who had gone to the site twice in 2006 when still an employee at the plaintiff's firm. PW7 can be seen in the photographs in B6 20–25 and 75–111. According to him the condition of the property was bad with a lot of damage, cracks in the beam at the front porch and internal wall and damage on the wall.

[13] There is further the evidence of PW11 the architect who had first visited the property on 10 November 2004 together with P1 and who subsequently prepared her report dated 10 February 2009 (B6 28–35) setting out the incomplete work, unsatisfactory work and non compliance with building plans and UBBL.

ELECTRICAL PROBLEMS

[14] The evidence of PW5 and PW6 shows there to be serious electrical issues on the water heater point, tripping and wiring colour not done according to colour cable identification.

[15] PW5 is an electrical wireman of 12 years experience whose registration in PW4 category allows him to do up to three phase electrical wiring work and testing calibration. He prepared the report in B2 49–56 dated 17 June 2014 on

the electrical work carried out by him on the property whereby he did a joint inspection with the plaintiff and PW6 on 17 June 2014. He also opened up the installed electrical works to see the work. He recorded his finding in the report and his conclusion is the electrical work is not up to regulation, dangerous and not safe. In cross-examination he stated the report was written by a worker. The photographs in the report were taken by him. He had not visited the property in 2004. The panel in B2 49 had already been installed and there was electricity in the property. As to whether if one light was switched on would cause a fire he replied there was a short circuit. There were many problems especially the water heater point. There were no problems for the light, fan or air conditioner. The tripping could be repaired but it was difficult as the cable had to be changed and the walls hacked. The house would not be burnt down. The water heater was dangerous but could be repaired. In re-examination he had told his worker what to write in the report and he could confirm what was written is correct by reading it. On the tripping and the difficulty in repairing this was because many cables had to be changed and this required opening up, hacking and cutting.

[16] PW6 prepared a report dated 15 April 2009 in respect of electrical work done on the property as in B6 83–89. It was his finding the wiring is not up to regulation, and the colour cable identification and electrical ring circuit proper was not right and proper. His finding was conducted on the review of P's letter dated 16 September 2005 to D, photographs of the electrical work and fourth schedule of S&P. His detailed finding is Q&A 10. When he was able to do a physical inspection on 20 June 2014 he prepared a second report dated 20 June 2014 in B2 58–62. The findings tallied with his first report. The detailed findings are in Q&A 13. Based on B6 83–89 the significance is that the wiring was not done according to Electricity Supply Act 1990, the wiring colour used is not done according to the colour cable identification as per IEEE wiring regulation, air con point and water heater point is not done according to JKR standards. The wiring system cannot be rectified but has to be redone. This is because the colour cable identification was not followed. They had used all black colour which is for neutral wire and for this part they can't rectify but have to pull out all the cable and redo. In cross-examination with regard to his report dated 15 April 2009 there is no confirmation on it from TNB. For this report he was at the property but could not enter it as it was locked. The photographs were provided by the plaintiff. The standards on colour cable and that of JKR is not in the bundles. He disagreed the property would be fit to stay in when the rectification is done. In re-examination on the photographs provided by the plaintiff he stated he went to the property on 17 June 2014 and what he saw tallied with the photographs. In further cross-examination he said from 2009–2014 he had not been to the property.

ENCROACHMENT

[17] The evidence of PW3 and PW4 shows there to be encroachment.

[18] PW3 is the manager for Jurukur Berjaya ('Berjaya') a surveyor firm doing cadstral and engineering survey. He was referred to B1 142–148 which are survey plans and he said he had knowledge and was aware of them. A demarcation survey was done for lot 72537 to pick out the details at the site based on the approved certified plans from survey department. From the plan the address is Jalan Amanat U2/45B and there is a lot number. The survey was carried out in December 2006 and completed on 20 December 2006. He did not go to the property when the survey was conducted but he was working for Berjaya then. Seah Kok Seang is their principal, sole proprietor and a licensed surveyor. He is still with Berjaya but is unable to attend court due to heart surgery. The survey concluded there was encroachment at the fencing as shown in all the survey plans. C6 27 is related to p 26. Berjaya had written C6 27 to confirm the encroachment and the survey has been carried out correctly. In cross-examination he stated the survey was done by someone else and he only checked. He was not there when the survey was done. There is nothing in the plans which has the word encroachment but B1 143 shows the boundary line for the property and the brick wall encroached by 0.227 metre. The letter in C6 26 made reference to the plans in B1 142–148. As to why it took Berjaya many years to write to the plaintiff when the plans are dated 20 December 2006 he said they wrote the letter after the plaintiff asked them to confirm and he wanted to file in court. He disagreed the plans in B1 142–148 are preliminary views on measurement. The plans were not submitted to any authority. He agreed there is no independent surveyor especially from the land authority to confirm their plans. It was put to him the measurements may be wrong and he replied 'might be'. He has never gone to the property. In re-examination as to how if the word encroachment is not stated in the plans he is able to confirm it as they do demarcation on the boundary to pick up the details and a value of 0.227 meter was obtained and this is the distance the wall has been moved. As to why the measurements might be wrong this could be due to human error.

[19] PW4 is a licensed land surveyor of four years experience and owner of Jurukur Wawasan. The firm does work such as land and engineering surveys. He prepared the report to the plaintiff dated 21 July 2014 in B2 124–132 in respect of the property. The work entailed measurements to determine the boundary (boundary survey) and platform level and the location of building. This was done on the basis of the plans drawn by Berjaya, plans from Jabatan Ukur Pemetaan Malaysia and land title. His report showed there were encroachments and platform level was +RL 9.76 when it ought to be +RL 10.20 and the platform level was lower by 440mm and his land survey work was consistent with that done by Berjaya. The tolerance level for setting out

deviation or error is 25mm. In cross-examination he stated the report to the plaintiff was dated July but the plans were prepared in June. He stated he had prepared the plans in B2 126–132. He checked and approved the plans and the measurements were done by Roslan and the drawings by Murni, his workers. He disagreed there could be a possibility there was a mistake in measurement. He has been to the property. As to whether there were any reports before his, he said there could have been from other surveyors but not from him. He disagreed his report was a preliminary view but agreed the plans were not referred to any authority such as survey department. His plans were based on the as built plans and had not received the approval or endorsement of Majlis Bandaran Shah Alam (MBSA). On the proof of encroachment as stated in his report it was based on the plans and there were no photographs. He agreed if there was any reduction in land size the purchaser would claim from developer and he didn't know there was any such claim. The encroachment stated in para 9(b) of his witness statement was on the left of the property. He disagreed to the suggestion the report was made by his workers and not by him. In re-examination as to how he could have done the report he said he would study the plans one by one, check and only then he wrote the report. He disagreed there could be a mistake in the measurements as he knows the work of his workers and there has been no record of any mistakes. He disagreed the report was preliminary as this was an as built survey and whatever is on site will not change.

THE DEFENDANT'S CONTENTION — PHOTOGRAPHS, SURVEY AND SITE INSPECTIONS

[20] The defendant had sought to challenge the evidence of PW1–PW9 by submitting on the photographs tendered by the plaintiff, the survey and the site inspections. With regard to the photographs PW1 had himself conducted a physical inspection of the property and prepared a report dated 15 June 2009 in C 39–46 and compared the photographs provided to him with his physical inspection. His finding was that of visible cracks lines on the house and that the ground had sunk. PW2 had also inspected the property on 31 January 2015 and from there he was able to verify PW1's report. PW6 had prepared two reports dated 15 April 2009 (B6 83–89) and a second report dated 20 June 2014 (B2 58–62). The second report was prepared after a physical inspection wherein the findings tallied with the first report. Hence it cannot be said the findings of these witnesses were made solely based on photographs. With regard to the survey although PW3 and PW4 did not do the survey PW3 had checked the survey plans in B1 142–148 and PW4 had prepared the report dated 21 July 2014 in B2 124–132. PW4 report confirmed that of the survey plans in B1 142–148 and was prepared by checking the plans which included that of Jabatan Ukur Pemetaan. On the physical inspections being done much later and some in 2014 and January 2015 these were to confirm the current condition.

[21] There is further the evidence of PW7 and PW11 who had visited the property in 2004, 2005 and 2006 as regards the condition of the property.

[22] Further the defendant had stated in their pleadings they would be calling technical experts to give evidence on the technical and safety issues raised. No technical experts were called. *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87 and *Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd* [2011] 5 MLJ 239 illustrate the outcome when a party elects not to call witnesses to rebut the evidence but chooses to rely on the terms of document. In *Raja Lob* no inspection had been done by the defendant's witnesses as opposed to the plaintiff (as referred to in p 253 of *Lim Chon Jet*. In *Lim Chon Jet* there was no evidence from the defendant who instead relied on the terms of S&P. In this instance there is no evidence from the defendant to refute the evidence of the plaintiff through PW1–PW9, PW11 and PW12 on the defects, cracks, settlement and encroachment but reliance on issuance of CF and vacant possession. Its failure to do so coupled with the evidence as set out above means they have not refuted the plaintiff's evidence on these issues.

PROPERTY DIFFERENT FROM BUILDING PLANS IN S&P

[23] On the construction of the property different from the building plans as that provided in S&P, it is evident that Second Schedule to S&P (B 20) has referred to MBSA/B/PC/SEK:U2/119-2001 which can be found in B2 6 and this differs from that which the architect has declared in Borang E (B6 81) MBSA/B/TP/SEK:U2/629–2002 (B 54). It is also different from that in the advertisement and sale permit as shown in the brochure (B 50). This does not appear to have been disputed by the defendant whereby the main point of submission was that as the amendment to the plans had been approved by Majlis Bandaraya Shah Alam ('MBSA') it was in order for the defendant to proceed and there was no challenge to the amendment by the plaintiff. However this does not detract from cl 14 of S&P which requires the building to be constructed in accordance with the plans approved by the local authority and no changes or deviations shall be made without the consent in writing of the purchaser. Here it was the plaintiff evidence he did not consent to any amendments. The evidence of PW10 (Director of Building MBSA) was that MBSA did not instruct the changes and DW2 (the architect) had said the changes were ordered by the defendant. The amendment to the building plans amounts to a breach of S&P by the defendant.

[24] With regard to the advertisement and sale permit where the building plans number is shown in B 50, reg 5(6) of the Housing Development (Control and Licensing) Regulations 1989 ('the Housing Regulations') allows any advertisement which differs from that for which the permit was first granted

subject to such variation being submitted for prior approval of controller. No evidence was led on the variation being submitted for approval.

ISSUANCE OF CF

[25] The defendant had relied on the fact of CF being issued by MBSA (B6 82), the fact of non-revocation and there being no challenge by the plaintiff meant the property was safe to be occupied. The evidence of PW10 has to be examined in its totality. Although she had stated as CF had been issued there is nothing wrong with the project and the project is safe, the inspection process in the issuance of CF meant not all the houses in the project had been inspected and it was done at random and that maybe MBSA had not inspected the plaintiff's house and if the project title is wrong a new one can be issued with the right title as replacement and if CF is issued and a building is found to be dangerous the CF would still not be revoked. MBSA is also not concerned with electrical issues as their concern is with Borang E and the requirement that the submitting person has to be registered with Architects Board. Hence there can still be safety concerns on the plaintiff's property despite the issuance of CF due to the random inspection and the limited scope for revocation.

VACANT POSSESSION

[26] On the issue of whether there had been vacant possession cl 22(1) states vacant possession shall be delivered in the manner stipulated in cl 23 within 24 months from the date of S&P which the plaintiff contend ought to be 24 December 2004 and which was not done. As against this the defendant refers to its letter dated 29 September 2004 to P (B6 1–2) stating construction is completed and vacant possession can now be delivered and this read together with cl 23(4) of S&P meant there had been vacant possession on 13 October 2004 ie upon the expiry of 14 days from the letter.

[27] Clause 23(2)(a) states that the delivery of vacant possession shall be supported by a certificate signed by the vendor's architect certifying that the said building has been duly constructed and completed in accordance with all relevant Acts, by laws and regulations and that all conditions imposed by the appropriate authority in respect of issuance of CFO have been duly complied with. The evidence of the defendant's architect DW2 in cross-examination was that this clause required a certificate to that effect and there was no such certification. He however disagreed as there was no such certificate this meant the plaintiff's property had not been constructed and completed in accordance with S&P and the relevant laws. It was DW1's evidence the architect certificate was the CPC. It was the evidence of PW10 CF and architect's certificate in cl 23(2)(a) are different in that CF is issued by local authority and the certificate for vacant possession is issued by the submitting person.

[28] The clear words of cl 23(2)(a) requires there to be an architect's certificate of which there is none as apparent from the evidence of the architect himself. The architect's certificate is not the CPC as understood by DW1 (Senior Operations Manager, Development). Without the architect's certificate there can be no vacant possession despite the defendant's letter dated 29 September 2004. The S&P is the form prescribed to Schedule G to the Housing Regulations as evident from the heading in B2. Refer to *Chase Perdana Bhd Sdn Bhd v Md Afendi Hamdan* [2009] 6 MLJ 783 for the principle that statutory requirements cannot be waived and that once enacted by legislation parties are required to comply with such provision. At p 790 it was stated:

> The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed.

RECTIFICATION WORK

[29] On the rectification work not being completed the defendant had relied on its letter dated 17 October 2005 (B6 47–50 and appendices) and notice of completion of defect works (B6 100) to show they had been rectified. The notice of completion is at best an internal document as it was not signed by the plaintiff at the column 'I acknowledge receipt of this notification ...'. As confirmed by DW2 there was no certification by the architect the defects had been rectified completely. Further there was no evidence that the defects as listed in B1 75–94 and B1 95–129 have been rectified. The reference to PW11's memo dated 24 March 2005 (B6 67) that 120 out of 160 defects in the complaints form dated 10 November 2004 (B1 1–40) had been rectified and the balance 40 are not defects as stated in DW2's letter dated 6 April 2005 (B6 68–70) does not negate the evidence of PW1–PW9, PW11–PW12 as to what they saw when they inspected the property in 2004, 2005, 2006, 2009 and 2015 particularly on the cracks, settlement and electrical problems.

REMEDIES

[30] The amendment and departure from the building plans resulting in the omission of work as shown in B2 63–67 amounts to a misrepresentation by the defendant. In *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 7 CLJ 152 it was stated at p 174:

> Rescission of the sale and purchase agreement is the best remedy if there has been a misstatement or misrepresentation of material facts, by the representor to the

representee, with the intention and effects of inducing the representee to enter into the sale and purchase agreement.

[31] Given the defects, cracks and settlement and electrical problems and that there is encroachment the plaintiff is no position to accept the property thereby leading to a total failure of consideration. Refer to *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 608; [2010] 1 CLJ 269 at p 282 that the right to rescind a contract is available where there has been a total failure of consideration.

CONCLUSION

[32] As per the OS para (a) is allowed, (b) allowed with 8%pa interest from 24 December 2004–31 July 2012 and 5% pa from 1 August 2012 to final settlement, (c) allowed from 24 December 2004 to date of order to rescind and para (g) for a consequential order that upon satisfaction of the judgment the plaintiff shall execute the transfer of the property to the defendant and the defendant to bear costs of transfer. Costs to the plaintiff.

Application allowed.

Reported by Afiq Mohamad